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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re JAIME MOJICA, JR.,

on Habeas Corpus.

E056175

(Super.Ct.No. RIF1101218)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Petition granted.

Janice R. Mazur, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, and Scott C. Taylor, Deputy Attorney General, for Respondent.

Pursuant to a plea bargain, petitioner Jaime Mojica, Jr., pleaded guilty to one count of interfering with a police investigation (Pen. Code, § 148; count 1, a misdemeanor) and one count of sale or transportation of methamphetamine (Health & Saf. Code, § 11379; count 2, a felony), with an enhancement for a prior drug conviction (Health & Saf. Code, § 11370.2, subd. (a)). As a result of the plea bargain, defendant

was sentenced to five years in the county jail, consisting of three years in actual custody, plus two years under supervised release. Defendant's offense date was February 14, 2011. He pleaded guilty on October 6, 2011, and was sentenced immediately, under the Criminal Justice Realignment Act of 2011 (Pen. Code, § 1170, subd. (h), as amended eff. Oct. 1, 2011; hereafter the Realignment Act or the Act). Defendant was awarded 97 days of credit for actual custody time, and 48 days of conduct credits under Penal Code section 4019. Petitioner contends that the trial court miscalculated his conduct credits.

Petitioner committed the crimes in this case before the Realignment Act went into effect. He pleaded guilty and asked for immediate sentencing after the effective date of the Act. Before the Act, petitioner would have been sentenced to state prison and received one-for-one credits under Penal Code section 2933, former subdivision (e) for all of his presentence time. Because of the Realignment Act, he was sentenced to jail, not state prison. He claims ex post facto and equal protection violations.

Defendant has requested immediate consideration of his habeas corpus petition, because, if he is granted the relief requested, he would be entitled to release on December 30, 2012. This court has issued an order for expedited consideration of the habeas corpus petition, together with defendant's appeal.¹ Assignment of both for consideration by the same panel ensures consistent decisionmaking and promotes judicial efficiency;

¹ Case No. E054767.

expedited treatment should permit time for a decision before defendant's hoped-for release date.

The court has read and considered the petition for habeas corpus and the informal response filed by the Attorney General. The Attorney General concedes petitioner is entitled to an additional 49 days of conduct credits. Given the Attorney General's concession, this court may grant relief without issuance of a writ of habeas corpus or an order to show cause. (*People v. Romero* (1994) 8 Cal.4th 728, 740, fn. 7.)

FACTS AND PROCEDURAL HISTORY

The matter arises on a plea of guilty, pursuant to a plea bargain reached before a preliminary hearing.

Defendant was charged in an amended complaint with one felony count of forcibly resisting arrest (Pen. Code, § 69; count 1), one felony count of selling or transporting methamphetamine (Health & Saf. Code, § 11379; count 2), and one misdemeanor count of attempted destruction of evidence (Pen. Code, §§ 135/664; count 3). Count 2, sale or transportation of methamphetamine, also alleged that defendant had previously been convicted of a prior drug offense, within the meaning of Health and Safety Code section 11370.2, subdivision (a).

Before the preliminary hearing, however, defendant agreed to a plea bargain: Count 1 was amended to allege a misdemeanor offense of interfering with a police investigation (Pen. Code, § 148, subd. (a)). Defendant agreed to plead guilty to count 1 as amended, and to count 2, as well as admitting the prior drug conviction enhancement.

Count 3 would be dismissed. The maximum custody commitment on the pleaded offenses was seven years, but the agreement would give defendant a total of five years, part to be served in the county jail, and part to be served on supervised release.

Accordingly, the court denied probation and sentenced defendant to a five-year principal term on count 2, consisting of the low term of two years for the offense, plus three years for the enhancement. The court ordered three years to be served in the county jail, and two years on supervised release. The court proceeded to set the terms of defendant's prospective supervised release, including setting various fines and fees, ordering drug testing, and calculating defendant's credits for time served. Defendant was awarded 97 days of credit for actual custody time, and 48 days of conduct credits under Penal Code section 4019. Defendant has filed a petition for writ of habeas corpus, asserting that the trial court miscalculated his conduct credits.

ANALYSIS

I. Defendant Is Entitled to Additional Conduct Credits

A. Introduction

Defendant contends that he is entitled to habeas corpus relief because his sentence to local custody in the county jail, under the Realignment Act, deprived him of certain conduct credits that he would have received had he been sentenced to state prison.

Defendant raises the issue both as a claim of ex post facto violation and as a violation of his equal protection rights. Pre-realignment inmates would have received one-for-one credits under Penal Code section 2933, former subdivision (e), which are denied to post-

realignment prospective state prisoners. The People concede as to the ex post facto ground.

B. Legal Analysis: Legislative History

The statutory provisions relating to credits earned while serving in a county jail or in state prison have been amended several times in recent years. Before January 25, 2010, Penal Code section 4019 provided that, if a defendant earned all available presentence conduct credits, six days would be deemed to have been served for every four days spent in actual custody, i.e., two days of credits earned per four days of actual custody. (§ 4019, former subd. (f); Stats. 1982, ch. 1234, § 7, pp. 4553-4554 [two-for-four credits].)

Effective January 25, 2010, the Legislature amended Penal Code section 4019 to increase the number of presentence conduct credits available to eligible defendants. (Stats. 2009 (2009-2010 3d Ex. Sess.) ch. 28, § 50.) Under the amended provision, certain defendants could earn credits at twice the previous rate, that is, two days of presentence credit for every two days of actual custody. (§ 4019, former subd. (f); Stats. 2009, ch. 28, § 50 [two-for-two credits].)

The Legislature again amended Penal Code section 4019 in September 2010, and this time the legislation also included changes to Penal Code section 2933. (See Stats. 2010, ch. 426, § 2 [Sen. Bill No. 76].) Among other things, Senate Bill No. 76 restored the old version of Penal Code section 4019, allowing a defendant to earn two days of credit for every four days of actual custody (two-for-four credits). Senate Bill No. 76

added a new subdivision—Penal Code section 4019, subdivision (g)—which provided that the newly decreased earning rate for credits would be applicable only to defendants who committed their crimes on or after its effective date, September 28, 2010. Finally, Senate Bill No. 76 also added Penal Code section 2933, subdivision (e)(1), which provided: “Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner.” In effect, Penal Code section 2933, former subdivision (e)(1) granted the benefit of one-for-one credits to any defendant ultimately sentenced to state prison.

The most recent 2011 amendments to Penal Code section 4019, as operative October 1, 2011, added subdivision (a)(6), which restored the two-for-two credits formula of two days of additional presentence credit for every two days of actual custody. The two-for-two credits formula applies, “When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp as a result of a sentence imposed pursuant to subdivision (h) of Section 1170.” This amendment removed a prior exclusion of certain classes of prisoners (e.g., those who must register as sex offenders, those who were committed for commission of a serious felony, or those who had suffered a prior conviction for a serious or violent felony), from receiving

increased benefits under the two-for-two formula applicable to presentence conduct credits.

Subdivision (h) of the most current version of section 4019, however, provides that the "changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011 [i.e., the effective date of the Realignment Act]. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." The Realignment Act also deleted subdivision (e) of Penal Code section 2933, and that provision no longer exists.

Subdivision (h) of Penal Code section 4019 appears to indicate that the Legislature intended that defendants would remain eligible for the conduct credits they earned before the effective date of the Realignment Act. Before the Act was adopted, defendants who were ultimately sentenced to state prison received one-for-one credits under Penal Code section 2933, subdivision (e), and they received such credits even for presentence confinement in the county jail. Thus, award of Penal Code section 2933 one-for-one credits for those sentenced to state prison was "the rate required by the prior law," under the present Penal Code section 4109, subdivision (h). Defendant is a person who, before the Realignment Act went into effect, would have been sentenced to state prison, and thus would have received one-for-one credits under Penal Code section 2933, former subdivision (e).

C. Relief

The Attorney General concedes that denying such credits to defendant would violate the constitutional prohibition against ex post facto laws. In *Weaver v. Graham* (1981) 450 U.S. 24 [101 S.Ct. 960, 67 L.Ed.2d 17], the United States Supreme Court found that a state's change to its conduct credits provisions was an unconstitutional ex post facto law. That is, Florida had reduced its "gain-time" provisions from five days per month in years one and two, to three days per month; 10 days per month in years three and four were reduced to six days per month; 15 days per month in the fifth and subsequent years were reduced to nine days per month. (*Id.* at p. 26.) The reduction in gain-time credits "chang[ed] the legal consequences of acts completed before its effective date" (*id.* at p. 31), and was thus unconstitutional.

As noted, when defendant was sentenced, he was awarded credit for 97 days of actual custody, plus 48 days of conduct credits. He requests one-for-one conduct credits, or an additional 49 days. We also observe that, although credits under Penal Code section 2933 are ordinarily calculated by the Department of Corrections and Rehabilitation, defendant is not housed in a state prison, such that Department of Corrections and Rehabilitation, and its administrative process, do not have jurisdiction to make the determination in this case. Accordingly, we grant the petition and order the trial court to award 49 days additional conduct credits (under Pen. Code, § 2933, former subd. (e)) to defendant.

DISPOSITION

The petition is granted. The trial court is ordered to award Jaime Mojica, Jr., 49 days additional custody conduct credits, pursuant to Penal Code former section 2933, subdivision (e). The abstract of judgment shall be corrected to reflect an award of 97 days of actual custody credit plus 97 days of custody conduct credits. The trial court is directed to amend the sentencing minute order and forward a copy to the Riverside County Sheriff's Department.

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MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.